

Charging Bullies

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Maximilian Steinbeis Sa 25 Mrz 2017

Dear Friends of Verfassungsblog,

this was a relatively quiet week here on the blog, very much unlike the world at large: In London, there was a new terrorist attack, in Germany there is a new President, and in the US there is most likely going to be a new Supreme Court Justice soon, tenured for life: Neil Gorsuch is his name, 49 years his age, and his job will be to help the Republicans bring down the administrative state and to let corporate citizens enjoy their constitutional right to privatize profits and socialize risks without oppression by environmental bureaucrats and climate experts. Whether or not he will fulfill this expectation [remains to be seen](#). This week, Gorsuch was grilled in the Senate, and next week I will interview Mattias Kumm, who, being a law professor in New York and Berlin, straddles both constitutional cultures and is therefore particularly qualified to explain such obscure matters as the "Chevron doctrine".

Not new, but more mind-boggling every day is what is going on with Recep Tayyip Erdoğan. The Turkish President could not know about the attack in London yet (I hope, at least) when he said in a speech in Ankara that "no European would be safe to walk on the street anywhere in the world any more". The head of the third-largest NATO member state issuing what sounds like a terrorist threat – who ever believed that Erdoğan's nazi and gas chamber invectives towards Europe could not be topped in sheer insanity stood corrected.

The schoolyard bully strategy

Mental health diagnoses are, as with Trump, [seldom a good way](#) to explain politics. Everyone knows that the ratio behind Erdoğan's attacks is the constitutional referendum on 16th April by which he seeks to transform his country into a [dysfunctional presidential autocracy](#). Europe, he keeps telling his compatriots, wants a weak Turkey, so if you want Turkey to be strong, vote Yes. This argument makes sense only if the premise looks plausible, so he needs Europe to show some degree of hostility towards Turkey. This he tries to achieve in the classical schoolyard bully manner, by unprovokedly shoving his fist into Europe's face.

The charm about the schoolyard bully strategy is that, as its victim, you cannot but lose. If you fight back, you lose by retroactively giving the bully a reason for his aggression. If you do not, you lose anyway. The schoolyard bully strategy (applied, in its passive-aggressive form, by comment section trolls, too, by the way) is a very low-risk strategy, which is why cowards like it so much.

The best way to cross this strategy is to address it. Violent speech is violence, but it is also speech and thereby subject to the demand for explanation. To make the bully explain himself while his fist is in your face is a lot to ask, of course, but if you do you stand a fair chance to emerge from the encounter with your dignity unharmed, if not your nose.

Another question is why we let the schoolyard bully on "our" schoolyard in the first place. The Turkish government does not just want to campaign for its referendum in our countries, but hold the referendum itself there, too: Anyone with a Turkish passport who lives in Germany can go to a Turkish consulate and cast his or her ballot there. Expatriates voting while not being subject to the power they vote for is not a matter of course, and a relatively new phenomenon – and perhaps more problematic than we thought? We will discuss these and other questions in another interview next week, with Rainer Bauböck from the EUI in Florence, political scientist and democratic citizenship expert and one of the most prominent experts in the field.

Cohesion and exit

British Prime Minister Theresa May will be pushing the so-called Article 50 button next week, named after the article in the EU Treaty which regulates the withdrawal of member states, thus officially starting the two-year period of negotiations at the end of which the United Kingdom will be definitely out. For Great Britain, Brexit is not only an economic and political turning point, but also a constitutional one: to recapture the "sovereignty of the British people" by withdrawing from the EU is not a trivial matter in a country where not the people but the parliament is sovereign – a dilemma that, according to OLIVER GARNER, would [have to be resolved by new elections](#).

What Scotland is for Great Britain is Catalonia for Spain: a region with strong autonomy rights whose government is bound to achieve complete independence but cannot do so unilaterally under national constitutional law. In **Spain**, the burden of fighting the Catalan separatism lies on the shoulders of the Constitutional Court, and a crushing burden it is. On top of it, the Spanish legislature has recently assigned to the Court the responsibility to enforce its own judgments with the recalcitrant Catalans by means of fines and suspensions from office, a measure which has now been examined by the Council of Europe's Venice Commission. VICTOR FERRERES COMELLA has looked into the opinion of the Venice Commission and explains [why its findings are not as pro-Catalan as the Catalan government would like them to be](#). A second opinion by JOAQUÍN URÍAS on the same topic will come hopefully until the beginning of next week.

In **Austria**, a ruling by the Federal Administrative Court has attracted great attention, according to which climate change is an argument on which an airport expansion project can fail. ANNA-JULIA SAIGER's analysis of the decision is [here](#).

The **CJEU** ruling on workplace headscarf bans from the previous week is also keeping us busy. IOANNA TOURKOCHORITI doubts whether the Court's requirement of neutral and objective dress codes for employees will be [enough to protect Muslim women from discrimination and shows how these things are done in the US](#).

Elsewhere

- On the occasion of the 60th anniversary of the Treaty of Rome, BJÖRN SCHIFFBAUER plays the party pooper and [calls for the establishment of European Coal and Steel Community Treaty 65 years ago as the founding moment of today's EU](#),
- LAURENCE ANKERSMIT explains a new CJEU ruling according to which the [right of environmental organizations to be heard in court cannot be brushed aside by the interest of member states to make their procedural rules more efficient](#) (the case is about brown bears in Slovakia)
- PAVLE KILIBARDA points out that [the ECtHR has condemned Hungary for its treatment of refugees in its so-called transit zones](#),
- IAN SAMUEL and LEAH LITMAN, on the occasion of the court rulings against Trump's Muslim Ban, ask [how far courts are allowed to question the \(discriminatory\) motives behind a legislative act](#), and evoke the notorious *Korematsu* verdict, with which Supreme Court condoned in 1944 the rounding up of Japanese-Americans, as a warning example of what happens when you do not,
- For those who already know what the Chevron doctrine is, ERIC POSNER lists evidence that Trump's Supreme Court nominee [Neil Gorsuch is indeed the Republican tool to dismantle the administrative state](#),
- MARK ELLIOTT reports on the exceptionally un-minced words with which [Lord Chief Justice Thomas has dressed down Justice Secretary and Lord Chancellor Liz Truss for her lack of publicly displayed solidarity for the judiciary against the "enemy of the people" headlines in the Miller proceedings](#),
- CÉLINE ROYNIER draws parallels between the [Fillon affair and the parliamentary expenses scandal which shook the British Isles in 2009](#), and [praises the British "constitutional morality" as an example](#), with the principle that no-one, not even the elected representatives of the people, can be judges in their own cases at its core.

So much for this week – that the next will be eventful I have already indicated. All the best, and take care,

Max Steinbeis

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